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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 71-6278

CONDRADO ALMIEDA-SANCHEZ, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF GILBERT FOERSTER

Gilbert Foerster respectfully moves for leave to file the attached brief *Amicus Curiae.*

Consent to such filing has been requested from and refused by the Attorney representing Petitioner Almieda-Sanchez, and has been requested from and given by the Solicitor General.

The interest of *Amicus Curiae* in the present case, and the reasons he moves for leave to file his brief at this time are as follows:

1. *Amicus Foerster* has petitioned this Court to grant Certiorari to review his criminal conviction for

violation of Title 21 U.S.C. §176a. The issues raised by that petition are the same as those raised by this case. The decision in this case will probably be dispositive of the issues raised by *Amicus* in his petition.

2. Attorney for *Amicus* has read the briefs of Petitioner Almieda-Sanchez and of the United States. Petitioner Almieda-Sanchez appears to be arguing, among other things, that probable cause is required to stop and search a vehicle for aliens near an international border. The government, on the other hand, contends that no cause or suspicion of any kind is required to stop and search vehicles for aliens within 100 miles of the border.

It is the position of *Amicus* that each party paints with too broad a brush. *Amicus* believes that the Court should fashion finely honed tools which both allow the government adequate enforcement techniques, while affording substantial protections for domestic travelers near our borders.

Neither the United States nor Almieda-Sanchez has suggested what such tools should be; each contends for a broad rule supporting the respective positions asserted.

Amicus had hoped that the parties would present positions closely paralleling his own. However, they have not and thus *Amicus* finds it necessary to file his brief at this time in order to suggest to the Court a method of resolving the issues not asserted by either party.

3. Additionally, it is unclear to *Amicus* whether his Petition for Certiorari will be granted, or whether

his Petition will be held pending decision in this case. Were the Petition of *Amicus* held pending decision, *Amicus* would have no opportunity to present his position to the Court.

4. This *Amicus* brief is filed within the time for the filing of Petitioner's reply brief, and is intended primarily as a reply to the position of the United States. It is imperative that the fundamental errors in the government's position be exposed, for if its position is adopted, serious inroads will have been made on the constitutional rights of a large segment of American society.

Dated, Berkeley, California,
November 14, 1972.

Respectfully submitted,
ARTHUR WELLS, JR.,
Attorney for Amicus Curiae

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BRIEF AMICUS CURIAE OF GILBERT FOERSTER

OUTLINE OF ARGUMENT

I

Congress has not sought to define what constitutes a reasonable method of enforcing United States immigration law; the Attorney General has attempted to usurp that power, which properly belongs to this Court.

II

If this Court is to relax the traditional requirement of probable cause as a prerequisite to some vehicular searches because of unique considerations applicable to international travel, then it must at least require the government to demonstrate that vehicles searched

without probable cause have some nexus with international travel.

III

Sound constitutional adjudication requires that the government, when it interferes with a citizen's right of privacy, 1) have some quantum of evidence indicating a particularized reason for the specific interference, and 2) proceed in a manner which, consistent with its objectives, has the least onerous impact on that citizen's right of privacy.

A. Some quantum of specific objective information has always been required to justify an invasion of privacy. The type of invasion permitted depends primarily upon the quantity and quality of the information.

B. In order to properly balance competing constitutional mandates, this Court must require the government to proceed by the alternative which places the least onerous burden on individual rights.

IV

A vehicular search for aliens is a major interference with a citizen's right of privacy, and therefore cannot be permitted without a standard of cause amounting to at least reasonable suspicion, especially where, as here, the government has not shown that its enforcement duties will be seriously hampered by the imposition of such a standard.

A. A vehicular search for aliens is a major interference with a citizen's right of privacy.

B. The government has failed to show that it cannot enforce the immigration laws pursuant to reasonable search rules nor even shown that it has attempted to fashion reasonable rules governing investigation of vehicles for aliens.

C. "Reasonable suspicion" is a reasonable rule.

ARGUMENT

I

CONGRESS HAS NOT SOUGHT TO DEFINE WHAT CONSTITUTES A REASONABLE METHOD OF ENFORCING UNITED STATES IMMIGRATION LAW; THE ATTORNEY-GENERAL HAS ATTEMPTED TO USURP THAT POWER, WHICH PROPERLY BELONGS TO THIS COURT.

Petitioner Almieda-Sanchez is apparently arguing that the statute under which the search herein was purportedly conducted, 8 U.S.C. §1357(a)(3) is unconstitutional. Petitioner's Opening Brief 20. The government, in response, asserts that "the central issue" is one of Congressional power. Brief for Respondent 8. If the constitutionality of that section is really in issue, then this Court should approach the problems presented with considerable deference for the acts of a coordinate branch of government, even though this Court could not support a legislative enactment which nevertheless violated the Fourth Amendment. *Boyd v. U.S.*, 116 U.S. 616 (1886). However, such is not the situation; none of the issues in this case properly raises the issue of the constitutionality of 8 U.S.C. §1357(a)(3).

All Congress did when it passed §1357(a)(3) was to state that immigration officials could conduct searches of places other than dwellings without warrant within a reasonable distance from international borders. The code section thus purports to dispense with a warrant requirement for vehicle searches and limits the search authority of immigration officials in geographical terms. But the subsection contains no directive or indication as to the basis required for a search or the manner in which it is to be conducted. On that point, the code is silent.

The legislature's failure to set a standard for searches for aliens is evident when §1357(a)(3) is contrasted with §1357(c), for in §1357(c) Congress specifically required a "reasonable cause to suspect" for a search of aliens seeking admission to the United States.

Further, whatever rights to privacy may exist for travelers, aliens seeking admission to the United States obviously have the least rights. Yet Congress required that a reasonable suspicion of grounds for exclusion exist to justify a search. An anomalous interpretation of the statute would result if this Court were to hold that a reasonable suspicion must exist to search aliens seeking entry, but no cause need exist to invade the privacy rights of citizens lawfully using the roads within the country.

The present lack of regulation has come about through inappropriate action by the Attorney General. Congress delegated to the Attorney General the right to make regulations governing some aspects of immi-

gration searches, 8 U.S.C. §1357(a). The Attorney General then promulgated regulations setting forth 100 miles, an apparently arbitrary distance, as a "reasonable" distance. No regulations at all have been passed to govern the manner in which searches for aliens are to be conducted or the basis required for such searches.[1]

Failure to pass such regulations strongly indicates that, at one time, the Attorney General read the statute the same way *Amicus* now reads it: no such regulations were passed because Congress did not legislate concerning the basis for or manner of conducting searches for aliens, and therefore rule making power in that area was not delegated to the Attorney General.

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[1]Thus, the apparent search policy of the Immigration Service:

"Well, our *formal* policy, our past apprehension reports show about 90% of our apprehensions come from Mexican-Americans or Mexican aliens. We pull these people predominantly over. We pull U-haul trucks. We cannot see inside—almost any vehicle that comes through that we cannot observe on the inside as a matter of policy, automatically pull those over.

"Vehicles that have the back end unusually low to the ground, indicating an unnecessary or unusual amount of weight in the trunk are often times suspect. Then it is a kind of undefinable thing except based on experience. You have been in the business a long time and some people look a little bit different to you, and they are worth a check, or they may not be, but they may be. So I say it is based a lot on experience and a great deal of what we are looking for." (Emphasis added)

Testimony in *Foerster v. U.S.*, Pet. for Cert. pending, No. 71-1293, cited in Petition at 8.

Contrast U.S. Treasury Dept., Bureau of Customs, Inspector's Manual for the Guidance of Customs Officers (1969 Revision), cited in part in the Brief for the United States, at pp. 19 and 35, in *U.S. v. Johnson*, cert. granted 400 U.S. 990, dismissed under Rule 60(2) on motion of the United States ___ U.S. ___, 30 L.ed.2d 35 (1971).

This matter is discussed further herein at pp. 27-29, *infra*.

But irrespective of whatever the Attorney General's position once may have been, he has since continually argued that his own regulations, or failure to pass regulations, control, and that all searches for aliens within 100 miles of the border are *per se* constitutional because of a regulation which speaks to geographical considerations only.

The Attorney General is thus seeking constitutional powers beyond those permissible. On the basis of a questionable delegation of authority from Congress, he first purports to legislate as to when searches are legal and when they are not. (Such power does not even belong to the Congress, for it cannot legitimize unconstitutional behavior). And, going even further, the Attorney General then argues that his own regulations usurp the right to declare when searches are constitutional, a traditional and proper function of this Court.

II

IF THIS COURT IS TO RELAX THE TRADITIONAL REQUIREMENT OF PROBABLE CAUSE AS A PREREQUISITE TO SOME VEHICULAR SEARCHES BECAUSE OF UNIQUE CONSIDERATIONS APPLICABLE TO INTERNATIONAL TRAVEL, THEN IT MUST AT LEAST REQUIRE THE GOVERNMENT TO DEMONSTRATE THAT VEHICLES SEARCHED WITHOUT PROBABLE CAUSE HAVE SOME NEXUS WITH INTERNATIONAL TRAVEL.

The government argues in this case that unique problems connected with policing international travel justify searches without warrant and without probable

cause.[2] Brief for Respondent 22, 24-25. It demands continued constitutional *carte blanche* in its efforts to deter and detect illegal alien entries.[3]

Amicus agrees that the imposition of a warrant requirement for immigration searches is inappropriate. But that concession in no way detracts from the rule that

> ". . . searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative. [T]he burden is on those seeking the exemption to show the need for it."
>
> *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), at 454-55.

The government asks not only for an exception to the warrant requirement, but also asks to be excused from the requirement of showing probable cause for vehicle searches for aliens. This would require the

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[2]It should be noted that the Government has failed to show that its policing problems at the border are *unique*, i.e., different from other common crime areas where search is important, such as narcotics investigation. This point is also germane to other aspects of the questions presented and is discussed at p. 30, *infra*. Uniqueness may be assumed for purposes of argument in this section.

[3]The Government's view of the problem is premised on a number of factual assertions upon which apparently no evidence was introduced in the trial court, and which was therefore not tested by cross-examination.

court to carve an exception from the long standing (and recently reaffirmed) rule requiring probable cause as a prerequisite to a lawful vehicle search. *Carroll v. U.S.*, 267 U.S. 132 (1924); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

The merits of a no-warrant, no-probable cause rule are discussed elsewhere in this brief.[4] The point here is that if there is to be a serious relaxation of long standing notions of minimal criteria for legal searches, it should only occur where facts indicate that "the exigencies of the situation make that course imperative." In other words, if there is to be a no-warrant no-probable cause rule respecting searches for aliens because of special considerations applicable to international travel, then such a rule must be limited to vehicles having some nexus with international travel.

Adoption of such a rule immediately poses the question of what standard of information is to be required to show a "nexus" with international travel.

Amicus suggests that the Court formulate a rule which requires that officials, to justify, in appropriate locations, a search, but not necessarily to justify a brief stop or interrogation, possess a reasonable suspicion, based upon articulable facts, that the vehicle in question had a nexus with international travel; that is, that the vehicle either had crossed the border or contained something or someone that recently had.

[4]See p. 15 et seq.

Probably the Court can require no more, for if it were to require probable cause to believe that a vehicle had a connection with international travel, the purpose of relaxing the probable cause requirement for searches would no doubt be defeated.

Failure to require any standard prohibits judicial review and leaves the government free to seriously invade constitutional rights of privacy upon whim of the investigating official:

> "The scheme of the Fourth Amendment becomes meaningful only when it is assured that *at some point* the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." (Emphasis added)
>
> *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

Lower federal courts have required that searches by Customs officials physically removed from the border be justified by showing that the officials had facts supporting a suspicion that the vehicle crossed the border or contained contraband that had done so. *Alexander v. U.S.*, 362 F.2d 379 (9th Cir. 1966); *United States v. Mahoney*, 427 F.2d 658 (9th Cir. 1970); *United States v. Weil*, 432 F.2d 1320 (9th Cir. 1970); *United States v. Markham*, 440 F.2d 1119 (9th Cir. 1970). There is no showing that Customs work has been substantially impaired as a result of the imposition of this "border search" doctrine.

The Government has never demonstrated that its immigration work would be substantially impaired

by the adoption of such a requirement. If some random stops, non-intrusive observations and brief interrogations were permitted in properly narrow geographical areas without cause, but reasonable suspicion of international connections were required for *searches*, it is doubtful that enforcement of the immigration laws would be seriously impaired. Such a connection could be established by an informant's tip, surveillance, or conversation with occupants of the vehicle.[5]

Thus, this Court should require that officials demonstrate that a reasonable suspicion of a nexus with international travel exists for each vehicle *searched* without probable cause.

Further, *Amicus* believes that assuming the appropriate nexus is established, a reasonable suspicion test should govern when immigration officials may search for aliens, for the reasonable suspicion standard finds ample doctrinal support in recent decisions of this Court, and provides a workable rule for the administration of the immigration program. It is to a discussion of these matters that *Amicus* now turns.

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[5]Thus, for example, Petitioner Almeida-Sanchez admitted, when stopped, that he was a resident alien who had just come from Mexico. Brief for Petitioner 4; Brief for Respondent 5, 40. *Contrast:* Amicus Foerster was stopped but *was never asked* where he or the vehicle had been, and the officials had determined that he and his passenger were United States citizens before searching the vehicle. *Foerster v. U.S.*, No. 71-1293, Pet. for Cert. Pending, Petition 5-8.

III

SOUND CONSTITUTIONAL ADJUDICATION REQUIRES THAT THE GOVERNMENT, WHEN IT INTERFERES WITH A CITIZEN'S RIGHT OF PRIVACY, (1) HAVE SOME QUANTUM OF EVIDENCE INDICATING A PARTICULARIZED REASON FOR THE SPECIFIC INTERFERENCE, AND (2) PROCEED IN A MANNER WHICH, CONSISTENT WITH ITS OBJECTIVES, HAS THE LEAST ONEROUS IMPACT ON THAT CITIZEN'S RIGHT OF PRIVACY.

A

Some Quantum Of Specific Objective Information Has Always Been Required To Justify An Invasion Of Privacy. The Type Of Invasion Permitted Depends Primarily Upon The Quantity And Quality Of The Information.

Citation of authority is unnecessary to establish that this Court has consistently rejected the notion that searches may be conducted without some underlying standard of cause. Some quantum of specific information to justify a particular search has always been required.

1. Normally, probable cause is required. The government is obligated to show that it has reasonably trustworthy information about facts and circumstances which are "sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." *Berger v. New York*, 388 U.S. 41 (1967).

2. The probable cause requirement normally means that the facts must focus on a particular person or place for a particular reason. But where enforcement problems of a unique character are present, the object of the search is not primarily for evidence of crime, and the search is of a limited nature, probable

cause requirements may be met by a more general showing, *Camara v. Municipal Court,* 387 U.S. 523 (1967); *See v. Seattle,* 387 U.S. 541 (1967). In *Camara,* this Court held that "administrative" searches of dwellings are subject to the Fourth Amendment, requiring absent consent, not only probable cause, but a warrant. The government had argued that such a requirement would totally stop enforcement, because officials would never have sufficient information to satisfy the traditional notion of probable cause that the facts specifically focus on particular places to be searched and things to be seized. *Id.,* at 534-539. This Court met the argument by holding that probable cause requirements might be satisfied by a more general showing than usually required. And this Court suggested further, in *See,* that a lesser showing might be adequate for "administrative" searches of commercial premises. *See,* at 546-47.

Here, then, is an example in which this Court, while still requiring a standard, enlarged the area of facts which would be "sufficient unto themselves" to constitute probable cause.

3. *Terry v. Ohio,* 392 U.S. 1 (1968), presents another situation in which traditional probable cause requirements were relaxed, but in which a standard of cause was still required. In *Terry,* this Court held that a police official may pat down a citizen for weapons where he has reasonable grounds to believe, based on articulable facts and inferences from those facts, that he is dealing with an armed and dangerous

individual. Thus, while not requiring facts "sufficient unto themselves," this Court still required that officers have objective information which leads them to focus on a particular individual for specific reasons.

4. The notion that a certain level of information provides an adequate focus to justify a search easily explains *Colonnade Catering Corp. v. U.S.*, 397 U.S. 72 (1970) and *U.S. v. Biswell*, ... U.S. ....., 40 L.W. 4489 (1972). In those cases, this Court upheld legislation permitting inspection of the commercial premises of liquor and gun licenses without warrant. Justification for those decisions may be found in *See v. Seattle, supra,* or on the ground that the licensees, being made aware of the law when they receive their licenses, had no justifiable expectation of privacy. Cf. *Katz v. U.S.*, 389 U.S 347 (1967). However, each case indicates a focus on a particular very small segment of the business community, and involving searches limited to the commercial premises of licensees during business hours.

It appears that neither Colonnade nor Mr. Biswell raised the question of lack of a standard of probable cause or reasonable suspicion to justify the searches involved. Apparently both were content to rest their presentations on the lack of warrant.[6] Thus, neither case addresses itself to questions of cause to search; merely because a warrant is not required does not mean that cause is not required. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Chambers v. Maro-*

[6] In *Colonnade*, it appears that cause for suspicion existed. *Id.*, at 72-73.

ney, 399 U.S. 42 (1970). And the justification for relaxation of the warrant requirement can be found in the focus inherent in the liquor and gun licensee situation.

In summary, then, some standard of cause has always been found necessary to justify a search. And, whatever the standard, for *each search* it must be based upon specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant that intrusion, *Terry v. Ohio*, *supra*, and cases cited at fn. 18 therein.

A brief re-examination of the cases just discussed from a different perspective indicates that it may be appropriate for this Court to permit, in certain locations, the brief stopping of a vehicle and a brief interrogation of its occupants without cause, while requiring a standard of cause for searches.

1. The overwhelming majority of searches are for evidence of crime. Such searches constitute major intrusions into privacy. Probable cause is uniformly required.

2. In *Camara v. Municipal Court*, *supra*, the permissible method of establishing probable cause was broadened. But the *Camara* Court carefully limited its holding to cover health and safety situations which were "neither personal in nature nor aimed at the discovery of evidence of crime."[7] *Id.*, at 537. While it is obvious that other factors, discussed below, con-

[7]Despite the government's assertion to the contrary, immigration searches are not "administrative" searches. See discussion at pp. 26-27 *infra*.

tributed to the decision, it is equally clear that the nature and scope of the search affected the decision to expand traditional probable cause notions.

3. In *Terry v. Ohio, supra,* this Court permitted a pat-down for weapons upon "reasonable suspicion," a standard less than probable cause. In other words, police, not having full probable cause, were to be limited to a "narrowly drawn authority" to pat down suspects. The nature and scope of permissible search was severely limited because of the lower standard of cause required.

This Court, then, has always made sure that the nature of the personal intrusion permitted was controlled by the information available to the government.

B

In Order To Properly Balance Competing Constitutional Mandates, This Court Must Require The Government To Proceed By The Alternative Which Places The Least Onerous Burden On Individual Rights.

The United States Constitution sets forth the respective rights of citizens and the powers of the federal government, leaving residual powers to the states. Our history provides abundant examples where the exercise of some governmental power produces an impact on some right. Yet the Constitution does not tell us whether the governmental power or the citizen's right is paramount.

The duty to resolve problems caused by the clash of conflicting constitutional mandates clearly falls on this Court. *Marbury v. Madison,* 1 Cranch 137 (1804).

Here the clash is between the federal government's powers under Article I, Section 8 of the Constitution, and the citizen's rights under the Fourth Amendment. The resolution of the conflict cannot be either to give the government total power or to give the citizen total privacy, for each of those results would negate some part of the Constitution. Rather, the resolution must result from striking a balance between the power and the right.

In the situation under discussion, the Fourth Amendment acts passively, as a shield against the sword of the government. The question is, how aggressively we should permit the swordholder to fight. The answer is, only as aggressively as necessary.

In other words, admitting that the government needs some power to enforce immigration laws, but recognizing that the exercise of such power will infringe on constitutionally protected rights of privacy, we should give to the government only the minimum authority it needs to enforce the laws. Only by requiring the government to proceed in that manner which, while permitting it to reasonably attempt to achieve its legitimate goals, results in the least infringement of constitutional rights, will the proper constitutional balance be struck.

It must be immediately conceded that any such balancing test will not produce the most efficient law enforcement possible. But it is beyond argument that in our democratic system efficiency is not the controlling principle to which all citizens' rights are subservient.

The balancing principle is well-settled:

1. *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951) concerned the constitutionality of an ordinance regulating the sale of milk and milk products within the municipality's jurisdiction. By reason of the ordinance the plaintiff, a distributor from another state, was prevented from marketing its products in Madison. Unable to invoke the Supremacy Clause because the federal government had not legislated exclusively in the field, *id.,* at 353, plaintiff claimed that the ordinance was invalid because it imposed an undue burden on interstate commerce, an assertion with which the Court agreed. This placed the Court in the position of having to resolve the conflict between plaintiff's clear constitutional right and the City's "unquestioned power to protect the health and safety of its people." The Court struck down the ordinance, even though it found that the City had the power to regulate in the field, a proper purpose in passing the ordinance, and a need for regulation. The ordinance was struck down because it appeared that reasonable and adequate alternatives were available to it to satisfy its needs. *Id.,* at 354.

2. *Shelton v. Tucker,* 364 U.S. 479 (1960) is illustrative of the application of the "least onerous alternative" doctrine to cases involving personal rights, rather than the "commercial" right asserted in *Dean Milk. Shelton* concerned an attack on an Arkansas statute which compelled every teacher, as a condition of employment in a state supported school, to annually file an affidavit listing all organizations to which

he had belonged or regularly contributed within the past five years. While conceding that the State had an unquestioned right to investigate the fitness and competence of those whom it hired to teach, this Court nevertheless struck down the statute because

> "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.* at 488.

The doctrine has been similarly applied in *Wisconsin v. Yoder*, ... U.S. ....., 40 L.W. 4476 (1972); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); *Talley v. California*, 362 U.S. 60 (1959), and *Sherbert v. Verner*, 374 U.S. 398 (1963).

3. The least onerous alternative doctrine has not been specifically articulated as such in cases dealing with the Fourth Amendment. But a reading of the cases discloses that this Court always addresses itself to an examination of the alternatives available in order to decide if a search procedure is "reasonable". Thus, to use only the cases immediately under examination as examples, in *Terry v. Ohio, supra*, the Court exhaustively examined the competing needs and alternatives, and limited the government to a pat-down check for weapons, as the alternative which imposed the least burden on rights of privacy. In *Cantara v. Municipal Court, supra*, this Court relaxed the specificity historically required to justify searches because

there was no less onerous alternative. And a similar application of the doctrine explains the different results in *See v. Seattle, supra,* and *U.S. v. Biswell, supra.* See *Biswell,* at 40 L.W. 4491.

While not clearly articulated in the Fourth Amendment decisions, the application of a doctrine requiring an examination of the alternatives available to the government is quite sensible. This Court must examine alternatives, for it must determine which searches are "reasonable", and what is reasonable depends on what alternative courses of conduct are available. While jumping from a second story window is usually considered an unreasonable method of egress from a building, it may become the only reasonable method of exit if the building is on fire.

The above discussion brings into focus the two fatal flaws upon which the government's argument is premised. The government argues that the appropriate test is to balance ". . . the governmental interest which allegedly justifies the official intrusion . . . as against the invasion entailed by the search or seizure." Brief for Respondent 11. But the appropriate test is not to balance the *interests:* both interests are of conceded importance. The proper test is to weigh the proposed method of enforcement against other alternatives available to reasonably achieve the government's goal, keeping in mind the infringements produced by the methods of enforcement.

Proper characterization of the balancing test indicates the second flaw. The government does not want this Court to closely examine its methods of enforce-

ment. Rather, it wants the Court to make a broad policy decision placing immigration enforcement powers above the Fourth Amendment, so that it can enforce a "program". Under such a "program", with unsupervised power, specific illegal searches would be regrettable but legal, as incidental to the program. But that type of balancing is not the function of a court. Instead, the Court must carefully examine the specific facts before it and make careful constitutional judgments. That can only be done by a close examination of alternative methods of enforcement and a determination of how much power it is necessary for the government to have to reasonably enforce our immigration laws.

IV

A VEHICULAR SEARCH FOR ALIENS IS A MAJOR INTERFERENCE WITH A CITIZEN'S RIGHT OF PRIVACY, AND THEREFORE CANNOT BE PERMITTED WITHOUT A STANDARD OF CAUSE AMOUNTING TO AT LEAST REASONABLE SUSPICION, ESPECIALLY WHERE, AS HERE, THE GOVERNMENT HAS NOT SHOWN THAT ITS ENFORCEMENT DUTIES WILL BE SERIOUSLY HAMPERED BY THE IMPOSITION OF SUCH A STANDARD.

A.

A Vehicular Search For Aliens Is A Major Interference With A Citizen's Right Of Privacy.

This Court has held that:

> The stopping of a vehicle on the open highway and a subsequent search amount to a major interference in the lives of the occupants.
>
> *Coolidge v. New Hampshire,* 403 U.S. 443 (1971).

Thus, because of the seriousness of the invasion, this Court has always required that officials meet a standard of cause as a precondition of a vehicle search. *Carroll v. U.S.*, 267 U.S. 132 (1964). *Chambers v. Maroney*, 399 U.S. 42 (1970); *Coolidge v. New Hampshire, supra.*

This rule cannot be relaxed to the point where vehicles of a large number of citizens within a large geographical area are subject to search upon an official's whim. The automobile is truly a necessary element in modern living. Indeed, it is the most common means of transportation we have. Enormous numbers of people regularly carry many private and personal things in them. Cars are made secure by locks on doors and trunks so that people can effectively exercise their rights to privacy. All those who own vehicles have expectations of privacy respecting some of the areas and contents of their vehicles, which they regularly exercise. A person must at least have the same privacy rights in his own car as he has in a public telephone. Cf. *Katz v. U.S.*, 389 U.S. 347 (1967).

As this Court has stated:

> The word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears.
>
> *Coolidge v. New Hampshire, supra,* at 461.

There can be little doubt that a vehicle search for aliens is a major intrusion. The searches occur on the open highway. As many people are not searched, those that are are made to feel embarrassed and be-

littled by being singled out for search. The searches apparently are conducted outside and often at night, where the driver no doubt feels insecure and exposed, and where he is, indeed, exposed. The driver is inevitably where he cannot secure witnesses to the search, where he cannot obtain aid from family or friends, and, probably in most cases, a long distance from the geographical area which is familiar to him around his home.

There is no evidence that the reason for the search is explained to the driver. There is no evidence that such searches are conducted in a polite, non-aggressive manner if possible. And there is no evidence that the detention period occasioned by the search is short.

The government cannot escape the fact that its searches are gross intrusions by labeling them "administrative" searches. The only pure administrative search would be one by a health inspector for persons with a disease such as smallpox, for no one is going to be arrested for having smallpox. Cf. *Robinson v. California*, 370 U.S. 660 (1962). While one could argue that the searches were hybrid, it is clear that the primary purpose of the searches is to determine who is breaking the variety of laws covering immigration. If violators are found, they are arrested on the spot. The fact that a decision is made later to deport rather than prosecute does not render the search an "administrative" one.

The government concedes that "a variety of criminal offenses [are] involved in the illegal entry and transportation of aliens." Brief for Respondent 28,

fn. 25. But it seeks to avoid the problems raised by the searches by saying that only 11,000 aliens were prosecuted. Even if true, these figures are beside the point. The government, in footnote 25 of its brief alleges that 398,000 aliens entered without "inspection" in 1972. Of these, according to footnote 24, only 11,586 were smuggled. Thus, for all we know, almost all the smuggled aliens *were* prosecuted. More importantly, the government is obviously looking for *those who smuggle aliens.* According to footnote 24, it "netted 2880 smugglers of aliens". It does not tell us how many were prosecuted, but common sense tells us that all, or the vast majority, were.

In short, the behavior of the immigration officials constitutes a gross invasion of privacy in a search for criminal behavior.

B.

The Government Has Failed To Show That It Cannot Enforce The Immigration Laws Pursuant to Reasonable Search Rules Nor Even Shown That It Has Attempted To Fashion Reasonable Rules Governing Investigation Of Vehicles For Aliens.

In its brief, the government attempts to paint the picture of a dedicated group of immigration officials diligently working to solve a problem so insurmountable that even total search authority is of minimal effectiveness. It asserts that its need is so great that this Court should permit operation of a "program" effectively outside the strictures of the Fourth Amendment. While we are told that the Immigration Service "would not claim statutory or constitutional authority to make random vehicle inspections for

aliens in Times Square" (or presumably San Francisco, or like places), this is apparently only because "There is, quite simply, not a sufficient need . . .", Brief for Respondent 31. Thus, it is clear that the government is seeking unfettered authority.

This remarkable position is wholly unwarranted, for the Immigration Service has not even attempted to live within a set of rules. In contrast, other branches of the federal government have carefully drawn search rules which they have apparently been able to live with.

Thus, the Bureau of Customs has carefully set forth criteria controlling when and the manner in which border searches are to be conducted, U.S. Treasury Dept., Bureau of Customs, Inspector's Manual for the Guidance Of Customs Officers (1969 Revision), cited in part in Brief for Petitioner, *U.S. v. Johnson*, cert. granted 400 U.S. 990, dismissed under Rule 60(2) on motion of United States, ___ U.S. ___, 30 L.Ed.2d 35 (1971). No claim has been made that Customs cannot enforce the laws, even though such searches now require a reasonable suspicion to sustain their validity. *Henderson v. U.S.*, 390 F.2d 805 (9th Cir. 1967); *U.S. v. Johnson*, 425 F.2d 630 (9th Cir. 1971). It may be inferred that the government is satisfied with the rules it promulgated and the imposition of a reasonable suspicion standard from the fact that it voluntarily dismissed its case in *Johnson* after this Court had granted Certiorari. ___ U.S. ___, 30 L.Ed.2d 35 (1971).

Another significant contrast is presented by the government's response to our recent air piracy problems.

Certainly it must be conceded that the current extent of air piracy presents a crisis of alarming proportions. Yet the government has not only apparently conceded that probable cause is necessary to search air passengers, but has designed an elaborate procedure which provides a measured series of responses by officials based on developments with which they are confronted. This procedure, set forth and discussed in full in *U.S. v. Lopez*, 328 F.Supp. 1077 (1971), requires passengers to walk through a magnetometer without any showing of cause. If the machine is set off, a brief detention and interrogation is permitted. Thereafter, if facts develop indicating that it is appropriate, a baggage search is permitted. Officials are thus permitted to handle situations as the facts develop without undue infringement on the privacy of air passengers.

Not only has the government failed to try to set up rules to govern its immigration duties, but it has failed to demonstrate that it cannot operate within a reasonable set of rules:

1. In its brief, the government continually speaks in terms of "programs", consisting of "checks", "inspections," "traffic checking operations," and "vehicle checks". The government nowhere distinguishes between detentions, interrogations and searches. It never addresses itself to the alternative of a system which distinguishes different investigative tools.

2. The government's statistics, even if true, fail to demonstrate need for a no-cause system. We are not told how many aliens are caught as a result of

searches. *More importantly,* we are not told how many of the searches which produced aliens were in fact based on a reasonable suspicion developed from a stop, a brief interrogation or an observation of the outside of the vehicle or from an informer's tip. Thus, for all we know, the great majority of aliens may be found by means of the interrogation process without any search, or by search where the official had concrete facts justifying a reasonable suspicion.

3. With respect to the permanent sites, we are never told why they were placed in a particular location. For example, *Amicus* was stopped at a checkpoint on the main road between San Diego and Los Angeles, seventy miles north of the Mexican border, at San Clemente, California.[8] The government has not demonstrated why an equally effective checkpoint could not be established south of San Diego, where it is more probable that travelers on the highway had recently engaged in international travel, which might warrant a brief stop and interrogation without a foundation of cause. While our borders are admittedly vast, our inland areas are patently larger.

4. The government has never demonstrated why enforcement problems of immigration laws differ significantly from enforcement problems involving other laws, such as narcotics, gambling, or organized crime. It has failed to show why it cannot use the tools which are effective in those areas.

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[8]While this checkpoint is very close to the coastline, it is clear that it is a *vehicle* checkpoint. In any event, the United States has never been bothered with the problems of what might be characterized as Pacific Ocean wetbacks. Thus, no justification for the site can be found in its proximity to the shore.

In summary, then, it must be conceded that the government has needs. But it has failed to show that its immigration officials cannot properly enforce the laws within a system which gives them, rather than unfettered authority, "an escalating set of flexible responses, graduated in relation to the amount of information they possess." *Terry v. Ohio, supra,* at 10.

"Reasonable Suspicion" Is A Reasonable Rule.

Amicus will here summarize his position.

1. A rule permitting brief stops and interrogations without cause is proper if limited to areas within a reasonable distance from the border, which is not always 100 miles. The government should be required to show that the distance is reasonable by showing prevailing conditions.

2. Before a *search* of a vehicle is permitted the government must show that it possesses specific articulable facts providing a reasonable suspicion that the vehicle or its occupants have a nexus with international travel and that the vehicle contains aliens. Such a rule would permit searches based on the condition of the car (whether it is riding low), any informer's tip, inconsistencies in the occupant's story, or foreign nationality, to name only a few instances. Searches based merely on the type of vehicle would not be permitted because almost all vehicles could conceal aliens.

3. Searches where no nexus has been shown would require probable cause.

While this set of rules will not result in a system in which all illegal aliens are apprehended, it will probably be as effective as the unconstitutional one now in force. The proposed rules, however, do provide a reasonable solution to the problem by giving the government a flexible system with measured responses designed to insure the least infringement on constitutionol rights possible.

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Respectfully submitted,
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